Supreme Court, U.S.
FILED

No. 96 375 SEP 9 1996

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In The

Supreme Court of the United States

October Term, 1995

ABDULLAH E. AL-HARBI,

Petitioner,

vs.

CITIBANK, N.A. and CITIBANK, a.s.,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia

PETITION FOR A WRIT OF CERTIORARI

HERMAN M. BRAUDE
Counsel of Record
SAMUEL M. MORRISON, JR.
BRAUDE & MARGULIES, P.C.
Attorneys for Petitioner
888 17th Street, N.W., Suite 500
Washington, D.C. 20006
(202) 293-2993

9538
Lutz Appellate Services, inc.
(800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21

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QUESTION PRESENTED FOR REVIEW

Does an arbitrator have a pre-arbitration duty to make a reasonable investigation to discover and disclose conflicts of interest which may constitute "evident partiality" as that term is used in the Federal Arbitration Act, 9 U.S.C.S. § 10(a)(2).

PARTIES TO THE PROCEEDINGS

Mr. Abdullah E. Al-Harbi is a citizen of the Kingdom of Saudi Arabia. He was the Plaintiff in the trial court, was the Appellant in the Court of Appeals, and is the Petitioner here.

Citibank, N.A. is a United States bank association with its principal place of business at 399 Park Avenue, New York, New York. Citibank, N.A. was a Defendant in the trial court, was an Appellee in the Court of Appeals, and is a Respondent here.

Citibank, a.s. is a wholly-owned subsidiary of Citibank Overseas Investment Corporation with its principal place of business at Evropska 178, 166 40 Prague 6, Czech Republic. Citibank, a.s. conducts a banking business in the Czech Republic as an affiliate of Citibank, N.A., and shares corporate supervisors with Citibank, N.A. Citibank, a.s. was a Defendant in the trial court, was an Appellee in the Court of Appeals, and is a Respondent here.

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To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Abdullah E. Al-Harbi, the petitioner herein, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia entered in the above-entitled case on June 11, 1996.

OPINION BELOW

On June 11, 1996, the United States Court of Appeals for the District of Columbia issued its opinion, affirming the decision of the United States District Court for the District of Columbia. The court of appeals opinion is reported at 85 F.3d 680.

STATEMENT OF JURISDICTION

Petitioner seeks review of the opinion of the United States Court of Appeals for the District of Columbia and its judgment of June 11, 1996. That judgment affirmed the lower court's decision. The jurisdiction of the Supreme Court is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

The Federal Arbitration Act:

> UNITED STATES CODE ANNOTATED
> TITLE 9. ARBITRATION
> CHAPTER 1 — GENERAL PROVISIONS
> Current through P.L. 104-18, approved 7-7-95
>
> Section 10. Same; vacation; grounds; rehearing

(a) In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration —

(1) Where the award was procured by corruption, fraud, or undue means.

(2) Where there was evident partiality or corruption in the arbitrators, or either of them.

(3) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.

(4) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

(5) Where an award is vacated and the time within which the agreement required the award to be made has not expired the court may, in its discretion, direct a rehearing by the arbitrators.

STATEMENT OF THE CASE

This is a case to vacate an arbitration award pursuant to the Federal Arbitration Act. The specific ground for appeal here is the split of authority among the federal circuits as to whether an arbitrator has a duty to make a reasonable investigation to discover and disclose conflicts of interest which may constitute "evident partiality" as that term is used in the Federal Arbitration Act, 9 U.S.C. § 10(a)(2).

The trial court had subject matter jurisdiction pursuant to the provisions of 28 U.S.C. § 1332, since this action is between a citizen of the United States and citizens of foreign countries; and the amount in controversy exceeds $100,000, exclusive of interest and costs. In particular, the Petitioner, Abdullah E. Al-Harbi, is a citizen of the Kingdom of Saudi Arabia; the Respondent Citibank, N.A. is a United States bank association with its principal place of business at 399 Park Avenue, New York, New York; and Respondent Citibank, a.s. is a wholly-owned subsidiary of Citibank Overseas Investment Corporation with its principal place of business at Evropska 178, 166 40 Prague 6, Czech Republic. Venue was proper pursuant to 9 U.S.C. § 11 because the arbitration decision was issued in Washington, D.C.

The United States Court of Appeals for the District of Columbia had subject matter jurisdiction pursuant to 28 U.S.C. § 41, since this was an appeal from a final judgment of the United States District Court For The District Of Columbia.

The case arises out of an underlying dispute between Mr. Al-Harbi, a citizen of Saudi Arabia; Citibank N.A., an American financial institution; and Citibank's wholly owned Czech Republic subsidiary, Citibank a.s. Mr. Al-Harbi alleges that the banks breached their fiduciary duty constructively through fraud, deceit, and/or misrepresented material facts which caused

Mr. Al-Harbi, a customer of the bank, to purchase a 50% interest in certain real estate in the Czech Republic at a price of $5,985,000 US that had sold the previous year for only $34,000 US. The owner of the property, coincidentally, owed Citibank overdue purchase money notes of approximately $5,830,000 US. Unknown to Al-Harbi, his purchase money allowed Citibank to recover its impending loss on these vastly under-secured notes.

Upon discovering these facts, Mr. Al-Harbi demanded recompense. When efforts to mediate the dispute proved to be ineffective, the parties entered into a written arbitration Submission Agreement, wherein they agreed to have the dispute "formally and finally resolved by binding mediation," *i.e.*, arbitration, by a sole arbitrator.

The arbitrator failed to make a pre-arbitration investigation which would have disclosed that his former law firm, where he had been a partner for thirteen years, and in which he had a continuing financial interest, represented Citibank as a long-time client. Not being aware of the conflict of interest, Al-Harbi accepted the arbitrator's representation that he would be impartial, and proceeded with the arbitration.

The arbitration was a so-called "baseball" format, where the arbitrator hears both sides' presentations, then chooses one side's number. In this case, the Submission Agreement allowed the arbitrator to add or subtract up to $500,000 from the number chosen. An evidentiary hearing was conducted, and in his written decision, the arbitrator chose Citibank's number of $600,000 and added $500,000, for a total award to Al-Harbi of $1,100,000, thus leaving him with a loss of approximately $4,800,000 US.

After the award was rendered, the fact of the law firm's

representation of Citibank, and of the arbitrator's failure to make an investigation surfaced. Pursuant to the Federal Arbitration Act, Al-Harbi filed a motion in the United States District Court for the District of Columbia to vacate the award on the ground, *inter alia*, of failure to investigate and disclose a conflict of interest which would constitute "evident partiality" pursuant to 9 U.S.C. § 10(a)(2). The trial court denied the motion; the circuit court affirmed the trial court's decision, and this appeal resulted.

REASONS FOR GRANTING THE WRIT

There is a split of authority among the federal circuits that creates confusion concerning the extent of an arbitrator's duty to investigate for possible conflicts of interest. Due to the ever-growing importance of arbitration in the business community, this split should be resolved.

Throughout the United States and across the world, arbitration and mediation are favored as means to resolve disputes outside of court litigation. It is well-settled that federal policy strongly favors arbitration. *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 105 S. Ct. 1238, 84 L. Ed. 2d 158 (1985). Commercial enterprises have become acutely aware of the overcrowding of court dockets, the priority given to criminal cases over civil cases, and the resulting costs, time, and vagaries of court litigation. In the United States, the arbitration of commercial disputes has been growing exponentially over the past few years. Fitzgerald and Groff, "Challenging Arbitration Awards", 89-4 *Construction Briefings* (March, 1989). Parties to all sorts of commercial agreements, large and small, now look to alternative means of dispute resolution to provide adjudicators who are not only experienced in the particular fields involved, but who will render impartial awards. Implicit in this process is the parties' reliance on the system to provide adjudicators who are not only experienced, but who are also impartial. It is

imperative that parties to arbitration agreements have reason to believe that the law will insure them a "fair shake" when they agree to give up their right to a court trial and submit disputes to arbitration, mediation, or some other form of alternative dispute procedure.

The split of authority among the federal circuits creates confusion concerning the extent of an arbitrator's duty to investigate for possible conflicts of interest, having the potential of creating doubt among arbitrators as to what their duties are; and suspicion among parties, that the law does not provide fair, impartial adjudicators in alternative dispute resolution procedures.

There is no question that arbitrators have a duty to disclose conflicts of interest that "might create an impression of possible bias." *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145, 149, 89 S. Ct. 337, 339-40, 21 L. Ed. 2d 301 (1968). The issue is whether an arbitrator must make a reasonable investigation to determine such conflicts of interest, or can he simply rely on his present memory, and only disclose conflicts of interest evidencing actual bias or improper motive.

One line of cases holds that it is the parties themselves who must judge the partiality of the arbitrators, thus, arbitrators have a duty to investigate and disclose conflicts of interest which may potentially create an impression of bias. The Ninth Circuit held in *Schmitz v. Zilveti*, 20 F.3d 1043 (9th Cir. 1994) that "an arbitrator may have a duty to investigate independent of its . . . duty to disclose," and further observed that "[a] violation of this independent duty to investigate may result in a failure to disclose that creates a reasonable impression of partiality." 20 F.3d at 1048. In *Schmitz*, the Ninth Circuit clearly stated the strong public policy underlying the reasoning of this line of cases requiring pre-arbitration investigation and disclosure:

Though lack of knowledge may prohibit actual bias, it does not always prohibit a reasonable impression of partiality. As Appellants argue, an arbitrator may have a duty to investigate independent of its *Commonwealth Coatings* duty to disclose. A violation of this independent duty to investigate may result in a failure to disclose that creates a reasonable impression of partiality under *Commonwealth Coatings*. For instance, the parties can expect a lawyer/arbitrator to investigate and disclose conflicts he has with actual parties to the arbitration. *Close v. Motorists Mut. Ins. Co.*, 21 Ohio App. 3d 228, 486 N.E. 2d 1275 (1985) (holding that the failure to do so created a reasonable impression of partiality under *Commonwealth Coatings*).

* * *

In the typical lawyer/arbitrator's case, lack of knowledge of a conflict may preclude a finding of actual bias. However, a reasonable impression of partiality can form when an actual conflict of interest exists and the lawyer has constructive knowledge of it. 486 N.E. 2d at 1278-79. That the lawyer forgot to run a conflict check or had forgotten that he had previously represented the party is not an excuse. See *In re Siegal*, 153 N.Y.S. 2d 673 (Sup. Ct. 1956). Also, an arbitrator may not know facts of which he may have been suspicious or of which he was on notice which, if true, would create a reasonable

> impression of partiality if not investigated and disclosed.
>
> * * *
>
> Requiring arbitrators to make investigations in certain circumstances gives arbitrators an incentive to be forthright with the parties, honestly disclosing what arbitrators might otherwise have an incentive to hide. *Commonwealth Coatings* establishes that the parties rather than the arbitrators or the courts should be the judges of the partiality of arbitrators: 20 F.3d 1048.

The contrasting line of cases holds that arbitrators have no duty to investigate, and must disclose only those conflicts of interest they have actual present knowledge of, and would constitute actual bias or improper motives. This line is represented by *Peoples Security Life Insurance Company v. Monumental Life Insurance Company*, 991 F.2d 141 (4th Cir. 1993). The Fourth Circuit held that "[t]he party asserting evident partiality has the burden of proof" and "The alleged partiality must be 'direct, definite, and capable of demonstration rather than remote, uncertain, or speculative.' " (quoting *Health Serv. Management Corp. v. Hughes*, 975 F.2d 1253, 1264 (7th Cir. 1992)). This standard requires evidence of actual bias or improper motive on the part of the arbitrator before the arbitrator's award can be challenged on the basis of "evident partiality." In the instant case the Court of Appeals recognized the split of authority, but opted to follow the standard of actual bias iterated by the Fourth Circuit:

> We of course are not bound by the Ninth Circuit's decision —

* * *

> We agree with the Fourth Circuit that "the burden on a claimant for vacation of an arbitration award due to 'evident partiality' is heavy, and the claimant must establish specific facts that indicate improper motives on the part of an arbitrator."

85 F.3d 683. Thus, there is a split of authority as to whether an arbitrator must make a reasonable investigation to discover and disclose conflicts of interest bearing on "evident partiality." Only the Supreme Court can resolve the dichotomy.

CONCLUSION

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

HERMAN M. BRAUDE
Counsel of Record
SAMUEL M. MORRISON, JR.
BRAUDE & MARGULIES, P.C.
Attorneys for Petitioner
888 17th St., N.W.
Suite 500
Washington, D.C. 20006
(202) 293-2993

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA DECIDED JUNE 11, 1996

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued March 29, 1996 Decided June 11, 1996

No. 95-7192

ABDULLAH E. AL-HARBI,

APPELLANT

v.

CITIBANK, N.A. AND
CITIBANK, A.S.,

APPELLEES

Appeal from the United States District Court
for the District of Columbia
(No. 94cv02425)

Herman M. Braude argued the cause and filed the briefs for appellant.

W. Neil Eggleston argued the cause for appellees, with whom *Stuart H. Harris* was on the brief.

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

Appendix A

Before: WALD, SILBERMAN and SENTELLE, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* SENTELLE.

Separate concurring opinion filed by *Circuit Judge* SILBERMAN.

SENTELLE, *Circuit Judge*: Abdullah E. Al-Harbi appeals from the District Court's order denying his prayer to vacate an arbitration award. We hold that the District Court properly applied the narrow standard applicable to review of arbitration awards under the Federal Arbitration Act. We therefore affirm.

I.

Al-Harbi, a citizen of Saudi Arabia, alleges that Citibank, a.s., a wholly-owned subsidiary of appellee Citibank, N.A., organized under the laws of the Czech republic, either defrauded him or breached a fiduciary duty toward him in a transaction in which he paid $5,985,000 U.S. for a fifty percent interest in real estate in the Czech republic, as a result of which he claims to have stood losses of up to $7.5 million U.S. After months of negotiation, the parties entered into nonbinding mediation before Kenneth R. Feinberg in London, England, on October 6-7, 1994. When it became clear that the nonbinding mediation would not be successful, the parties agreed to a binding arbitration. Though Feinberg recommended several possible arbitrators, in the interest of a speedy resolution, the parties agreed to Feinberg himself conducting the arbitration immediately under a "baseball" format, in which the arbitrator hears both sides' presentations, then chooses one side's number. They further agreed to a modification of the baseball

format to the extent that the arbitrator could add or subtract up to $500,000 to or from the number chosen. Feinberg chose Citibank's number of $600,000 and added $500,000, for a total award to Al-Harbi of $1,100,000.

Al-Harbi, dissatisfied with the award, brought this action in the District Court to vacate the arbitration award. After receiving all proffered submissions from both parties, the District Court entered its order denying Al-Harbi's relief. He brought the present appeal.

II.

The Federal Arbitration Act ("FAA"), 9 U.S.C. § 10 (1994), empowers a federal court to vacate an arbitration award only

> (1) Where the award was procured by corruption, fraud, or undue means.
>
> (2) Where there was evident partiality or corruption in the arbitrators, or either of them.
>
> (3) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.
>
> (4) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

Courts have also recognized a limited nonstatutory ground for vacating an arbitration award where the arbitrator has acted in "manifest disregard of the law." *Kanuth v. Prescott, Ball & Turben, Inc.*, 949 F.2d 1175, 1178 (D.C. Cir. 1991) (citing *Wilko v. Swan*, 346 U.S. 427, 436 (1953) (dicta)). Although Al-Harbi launched a multi-faceted attack on the arbitration award in District Court, the only proffered grounds for vacatur warranting specific mention here are (1) that the arbitrator exhibited "evident partiality"; and (2) that the arbitrator exhibited "manifest disregard of the law." He has not shown, either in the District Court or on appeal, any adequate basis for vacatur on either of these grounds.

A.

Appellant's "evident partiality" argument is based on the fact that Feinberg's *former* law firm had represented Citibank on matters unrelated to the mediation or the underlying dispute. Appellant emphasizes that Feinberg did not disclose this representation to the parties to the mediation, but it is undisputed that Feinberg did not have knowledge of the representation at the time of the arbitration. Appellant's argument therefore depends on the proposition that Feinberg had a duty to make inquiry as to whether or not his former law firm had ever had any connection with any of the parties to the arbitration and thereafter make disclosure of the results. We can find no source for any such generalized duty.

In support of his contention that such a duty exists, Al-Harbi relies on *Schmitz v. Zilveti*, 20 F.3d 1043 (9th Cir. 1994). In *Schmitz*, the Ninth Circuit reversed a district court's judgment upholding an arbitration award where the arbitrator's law firm had represented a subsidiary of one of the parties in at least

nineteen cases over a period of thirty-five years, the most recent having ended approximately twenty-one months before the arbitration. The Schmitz court stated that "an arbitrator may have a duty to investigate independent of its . . . duty to disclose," and further observed that "[a] violation of this independent duty to investigate may result in a failure to disclose that creates a reasonable impression of partiality." 20 F.3d at 1048.

We of course are not bound by the Ninth Circuit's decision, and in any event, find it distinguishable both on its facts and the applicable law. In *Schmitz*, the arbitrator was conducting the proceedings under the National Association of Securities Dealers ("NASD") code, which required him "to make such an investigation regarding the actual parties to th[e] arbitration." *Id.* In the present case, not only does the NASD code not apply, but the alleged evident partiality arises not from a representation by any firm with which the arbitrator was connected at the time of the arbitration, but from representation in unrelated matters by a firm with which his only continuing connection was, concededly, an interest in receivables, none of which were generated by any party connected with the arbitration. Thus, even if *Schmitz* were our own decision, it would not answer the question before us today.

Only our decisions and those of the Supreme Court bind us as precedent, and neither we nor the highest court have yet considered whether a duty of investigation underlies the arbitrator's duty to disclose facts that "might create an impression of possible bias." *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145, 149 (1968). Lacking binding precedent, the District Court in the present case relied heavily on an earlier opinion by another district judge in this

circuit. *Overseas Private Inv. Corp. v. Anaconda Co.*, 418 F. Supp. 107 (D.D.C. 1976) ("*OPIC*"). In *OPIC*, Judge Flannery held that where no reasonable person could find the arbitrator "to have known any potentially prejudicial information" prior to the award, there was no basis for a conclusion of evident partiality and he affirmed the arbitration award. *Id.* at 112.

The Fourth Circuit considered the duty of disclosure issue on facts more analogous to those before us than were those in the Ninth Circuit's decision. In *Peoples Security Life Insurance Company v. Monumental Life Insurance Company*, 991 F.2d 141 (4th Cir. 1993), that court reached the same conclusion as Judge Flannery in *OPIC*. In the *Peoples Security* case, the arbitrator worked in the Newark, New Jersey, and New York, New York, offices of the LeBoeuf law firm. 991 F.2d at 143. An attorney named James Nolan joined the Washington office of the same firm in May of 1990. He had signed an initial complaint on behalf of one of the parties to the arbitration under review in Peoples Security at a time while he was a partner in a different law firm. 991 F.2d at 145. The final portion of the arbitration occurred after Nolan joined the LeBoeuf firm. *Id.*

While not specifically addressing whether the arbitrator's duty to disclose incorporates the duty of investigation advanced by appellant here, in reasoning applicable to the instant case, the Fourth Circuit held that "[t]he party asserting evident partiality has the burden of proof." 991 F.2d at 146. The circuit further iterated, "The alleged partiality must be 'direct, definite, and capable of demonstration rather than remote, uncertain, or speculative.' " *Id.* (quoting *Health Serv. Management Corp. v. Hughes*, 975 F.2d 1253, 1264 (7th Cir. 1992)). We agree with the Fourth Circuit that "the burden on a claimant for vacation of an arbitration award due to 'evident partiality' is heavy, and the claimant must establish specific facts that indicate improper

motives on the part of an arbitrator." 991 F.2d at 146. In light of this onerous standard for vacatur, we affirm the District Court's refusal to vacate the arbitration award, and as did the District Court in the present case and in *OPIC*, we hold that, nothing else appearing, the fact that an arbitrator has not conducted an investigation sufficient to uncover the existence of facts marginally disclosable under the *Commonwealth Coatings* duty is not sufficient to warrant vacating an arbitration award for evident partiality. That is, we explicitly hold that there is no duty on an arbitrator to make any such investigation.

B.

Appellant's argument that the District Court should have vacated the arbitration award on the non-statutory ground that the arbitrator demonstrated "manifest disregard" of the applicable law is totally meritless. This basis for vacatur traces its lineage to language in *Wilco v. Swan*, 346 U.S. at 436-37,[1] stating that "interpretations of the law by the arbitrators in contrast to *manifest disregard* are not subject, in the federal courts, to judicial review for error in interpretation." 346 U.S. at 436-37 (emphasis added). Plainly, this non-statutory theory of vacatur cannot empower a District Court to conduct the same *de novo* review of questions of law that an appellate court exercises over lower court decisions. Indeed, we have in the past held that "it is clear that [manifest disregard] means more than error or misunderstanding with respect to the law." *Kanuth*, 949 F.2d at 1178. What appellant styles as "manifest disregard" in the present case does not readily appear even erroneous.

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1. Although the holding in *Wilco* was overruled by *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989), the dicta that constitutes the core of appellant's argument was unaffected by the grounds of the overruling.

Appendix A

The submission agreement under which the arbitrator decided the controversy mandated that the arbitrator would apply "the procedural and substantive laws of the Southern District of New York, U.S.A." The arbitrator ruled that jurisdiction would be difficult to establish in New York, but even assuming that it could be established, "this case would be dismissed on the ground of *forum non conveniens*." Arbitration Memorandum at 10. The crux of appellant's argument is not that the arbitrator disregarded New York law in determining that a New York court would dismiss on *forum non conveniens*, but only that *forum non conveniens* is procedural law and that the arbitrator was obligated to apply "the procedural and substantive law of New York (not "or substantive law')." Appellant's Brief at 25. Appellant's argument then depends upon the proposition that where a tribunal is to render decision based on "procedural *and substantive* law" that tribunal has not only erred, but acted in manifest disregard of the law if it finds that procedural factors are dispositive of the case without then going on to consider substantive law rendered apparently moot by that procedural decision. To state that proposition is to reject it. We find no basis for vacatur.

Conclusion

For the reasons set forth above, we affirm the order of the District Court denying vacatur of the arbitration award.

Appendix A

SILBERMAN, *Circuit Judge, concurring*: I concur in the panel's opinion. I do not think an arbitrator has a duty—at least absent governing rules such as the NASD provision applied in *Schmitz*—to search his former law firm's client list to determine whether one of the parties before him had been a client of his former law firm. We should bear in mind that arbitrators, unlike judges, are chosen by the parties, and any extensive duty to investigate the client list of former law firms, or even perhaps a very large present law firm, will just increase the costs. Of course, the parties can request such a search, but that is a different matter. I do not think, however, that the absence of any particular duty can be explained—as does the Fourth Circuit in *People's Security*—in terms of the burden of proof on the party seeking to overturn the award. Obviously, if a duty to investigate existed, the burden of proof would have been met by establishing that the arbitrator failed to perform it.

APPENDIX B — JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA FILED JUNE 11, 1996

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 95-7192 September Term, 1995

Abdullah E. Al-Harbi,

Appellant

v.

Citibank, N.A. and
Citibank, A.S.,

Appellees

Appeal from the United States District Court
for the District of Columbia
(No. 94cv02425)

Before: WALD, SILBERMAN and SENTELLE, *Circuit Judges*.

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia and was argued by counsel. On consideration thereof, it is

ORDERED and **ADJUDGED**, by the Court, that the judgment of the District Court appealed from in this cause is

hereby affirmed, in accordance with the opinion for the Court filed herein this date.

FOR THE COURT:
Mark J. Langer, Clerk
BY: s/ Robert A. Bonner
Robert A. Bonner
Deputy Clerk

Date: June 11, 1996

Opinion for the Court filed by Circuit Judge Sentelle.

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA FILED JULY 17, 1995

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 94-2425 (NHJ)

ABDULLAH E. AL-HARBI,

Plaintiff,

v.

CITIBANK, N.A., *et al.*,

Defendants.

ORDER

Upon consideration of the motion of plaintiff, Abdullah E. Al-Harbi, to vacate the arbitration award of October 13, 1994, the memoranda in support thereof and in opposition thereto, the oral argument of counsel at a hearing on this matter, and for the reasons set forth in the Memorandum Opinion issued on this date, it is this 18th day of July, 1995,

ORDERED that the motion to vacate arbitration award pursuant to 9 U.S.C. § 10 (1994) be, and hereby is, denied.

s/ Norma Holloway Johnson
NORMA HOLLOWAY JOHNSON
UNITED STATES DISTRICT JUDGE

Supreme Court, U.S.
FILED
OCT 10 1996
CLERK

(2)

No. 96-375

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

ABDULLAH E. AL-HARBI,
Petitioner,

v.

CITIBANK, N.A. and CITIBANK, A.S.

On Petition For A Writ Of Certiorari To The United States Court of Appeals For The District Of Columbia Circuit

BRIEF FOR THE RESPONDENTS IN OPPOSITION

RICHARD N. PAPPER
THEODORE BAJO
CITIBANK, N.A.
425 Park Avenue
New York, New York 10043
(212) 559-1970

W. NEIL EGGLESTON
Counsel of Record
STUART H. HARRIS
JAMES G. KRESS
TIMOTHY K. ARMSTRONG
HOWREY & SIMON
1299 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
(202) 783-0800

Counsel for Respondents
Citibank, N.A. and Citibank, a.s.

13 pp

RESTATEMENT OF QUESTION PRESENTED

When a party requests a specific arbitrator but fails to request an investigation of the business dealings of that arbitrator's former employer, does the Federal Arbitration Act imply, *sub silentio*, an independent duty on the arbitrator's part to investigate a business relationship of its former employer (1) that is unrelated to the dispute being arbitrated, (2) in which the arbitrator himself was not involved, and (3) that was unknown to the arbitrator and therefore could not affect his decision?

RESPONDENTS' CORPORATE DISCLOSURE PURSUANT TO S. CT. R. 29.6

The statement of Respondents' corporate affiliations given on page ii of the Petition is correct.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

ABDULLAH E. AL-HARBI,

Petitioner,

v.

CITIBANK, N.A. and CITIBANK, A.S.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District of Columbia Circuit

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BRIEF FOR THE RESPONDENTS IN OPPOSITION

The Petition mischaracterizes both the decision of the court of appeals below and the decision in *Schmitz v. Zilveti*, 20 F.3d 1043 (9th Cir. 1994), in an attempt to manufacture an intercircuit conflict where none exists. This case presents no substantial unsettled question of federal law. Accordingly, the Petition lacks merit and should be denied.

PROCEEDINGS BELOW

On July 18, 1995, the U.S. District Court for the District of Columbia, in an unpublished order, denied Petitioner's motion to vacate the arbitration award.

On June 11, 1996, the U.S. Court of Appeals for the District of Columbia Circuit issued its opinion affirming the district court. *Al-Harbi v. Citibank, N.A.*, 85 F.3d 680, 683 (D.C. Cir. 1996). The court of appeals held that, where the applicable arbitration rules did not require investigation of the business contacts of the arbitrator's former employer, the failure to conduct such an investigation, standing alone, was insufficient proof of "evident partiality" to justify vacating the award. The court of appeals distinguished, as legally and factually inapposite,

authorities offered by Petitioner holding that where specific arbitration rules require such an investigation, the failure to investigate can lead to vacatur. The court of appeals also rejected Petitioner's argument that the arbitrator exhibited "manifest disregard" of the applicable law. This latter holding is not challenged in the Petition.

STATEMENT OF THE CASE

Petitioner Abdullah E. Al-Harbi invested in a real estate development project in the Czech Republic in 1992. Partial financing for the development was provided by Respondent Citibank, a.s., a Czech corporation.

A dispute later arose over the transaction. When Mr. Al-Harbi was unable to resolve his dispute with Citibank, a.s., the parties agreed to submit the matter to nonbinding mediation. The parties jointly selected Kenneth R. Feinberg, an attorney and financial expert, as the mediator. In a pre-mediation interview with counsel for Mr. Al-Harbi, Mr. Feinberg disclosed, among other things, that he had once been a partner in the large New York law firm of Kaye, Scholer, Fierman, Hays & Handler ("Kaye, Scholer"). The nonbinding mediation was held in London in early October 1994.[1]

At the mediation, it shortly became clear that the parties' positions could not be reconciled and mediation would not resolve the dispute. Accordingly, both sides agreed to submit the dispute to binding arbitration. Mediator Feinberg suggested several former federal judges who could serve as arbitrators and suggested that the arbitration occur in ninety days. Mr. Al-Harbi insisted, however, upon an immediate, binding decision. He therefore rejected Mediator Feinberg's list of suggested arbi-

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[1] Thus, this case involves a London mediation, and subsequent arbitration, of a dispute between a Saudi citizen and a Czech corporation over a transaction that occurred in the Czech Republic involving a parcel of Czech real estate. Although issues of personal jurisdiction and *forum non conveniens* are not mentioned in the Petition, they were substantial factors in the prior proceedings in this case, and form additional reasons for this Court to deny certiorari.

trators and insisted that Mediator Feinberg himself serve as the arbitrator. This much must be clear: Mr. Feinberg served as the arbitrator in the binding arbitration because Mr. Al-Harbi demanded that he do so. Mr. Al-Harbi did not, at this or any other time, request any investigation into the prior business dealings of Mr. Feinberg's former employer. On October 7, 1994, the parties signed a binding arbitration agreement requiring Mr. Feinberg to issue his final decision within six days.[2]

The arbitrator issued his final decision on October 13, 1994, ordering Respondents to pay Mr. Al-Harbi $1.1 million "in full satisfaction and resolution of all issues arising from this dispute." (Arbitrator's Decision at 10–11). Unsatisfied with this substantial sum, Mr. Al-Harbi brought suit to have the order set aside under the Federal Arbitration Act (FAA), 9 U.S.C. § 10. The sole basis for this lawsuit relevant to the instant Petition was Mr. Al-Harbi's allegation that the arbitrator's *former* law firm, New York's Kaye, Scholer, had once represented Citibank on intermittent banking matters wholly unrelated to the instant proceeding.

It has at all times been undisputed that: (1) Mr. Feinberg was not aware of the relationship between his former employer and Citibank; (2) Mr. Feinberg never worked on any matters for Citibank during his tenure at Kaye, Scholer; (3) Kaye, Scholer never performed any services for Citibank relating to this dispute or the underlying real estate transaction; (4) Mr. Feinberg held no continuing financial interest in Kaye, Scholer at the time of the arbitration except for any receivables that were owed the firm at the time of his departure; and (5) Mr. Feinberg had no financial interest of any kind in the outcome of the arbitration.

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2 The parties' Agreement also provided that "All parties agree that they will be without recourse to challenge the binding decision of the Mediator, and the decision will be binding on the parties, and all heirs, successors or assigns, in any and every court or tribunal in any and every country in the world, whether known or unknown as of the date hereof." (Agreement at 1, para. 2).

REASONS FOR DENYING THE WRIT

There is No Circuit Split or Important Unsettled Question of Federal Law Requiring Action by This Court

The decision of the court of appeals affirming the district court is correct and does not conflict with any decision of this Court or any decision of any other court of appeals. Further review by this Court is not warranted.

The Petition attempts to manufacture a circuit split, ostensibly between *Schmitz v. Zilveti*, 20 F.3d 1043 (9th Cir. 1994) on one side, and *People's Security Life Ins. Co. v. Monumental Life Ins. Co.*, 991 F.2d 141 (4th Cir. 1993), and the court of appeals's decision in this case on the other. But contrary to Petitioner's argument, there is no split among the circuits on any substantial question of federal law requiring resolution by this Court.

In this case, the D.C. Circuit took pains to distinguish *Schmitz* from the case before it. Petitioner cannot seriously contend that a "split of authority among the federal circuits" (Pet. 5) results every time one appeals court concludes that another's precedent is not on point. The D.C. Circuit in this case simply ruled that the *Schmitz* case did not resolve the question this case presented; it did not hold that *Schmitz* governed but was wrongly decided. *See Al-Harbi v. Citibank, N.A.*, 85 F.3d 680, 682–83 (D.C. Cir. 1996) (finding *Schmitz* "distinguishable both on its facts and the applicable law. . . . Thus, even if *Schmitz* were our own decision, it *would not answer the question before us today.*") (emphasis added) (Pet. App. 5a).

Moreover, the distinctions the court of appeals recognized between *Schmitz* and this case support its conclusion that the Ninth Circuit's precedent does not govern here. The key fact Petitioner overlooks is that, in *Schmitz*, the arbitration was conducted under the rules of the National Association of Securities Dealers ("NASD"), which expressly and specifically required the arbitrator to investigate the known potential conflict in that case. The Ninth Circuit merely held that this express requirement

meant what it said.[3] *Schmitz* did not hold that an arbitrator would have had such a duty to investigate in the absence of a rule requiring it. Accordingly, *Schmitz* provides no support for Petitioner's argument that the FAA, without saying so, requires an arbitrator to undertake the same investigation expressly mandated by the NASD Rules. *Schmitz* turned on facts that are indisputably absent in this case: no arbitration rules required investigation of the alleged conflict Petitioner now says tainted the arbitration.[4]

Additional distinctions between *Schmitz* and this case render *Schmitz* inapplicable. The arbitrator in *Schmitz* was aware of the business relationship he failed to disclose, whereas it is undisputed in this case that Mr. Feinberg had no knowledge of his former employer's representation of Citibank. *See Betz v. Pankow*, 38 Cal. Rptr. 2d 107, 111–12 (Cal. Ct. App. 1995) (*Schmitz* notwithstanding, attorney arbitrator "cannot be faulted for failing to disclose facts of which he was unaware," specifically, his former law firm's work on behalf of one party to the arbitration), *review denied* (Cal. S. Ct. Apr. 19, 1995). It is also undisputed that Mr. Al-Hakbi himself had actual knowledge of the arbitrator's former employment with Kaye, Scholer. *See id.* at 112 (arbitrator's "prior membership in the Bronson firm was disclosed"); *see also Woods v. Saturn Distrib. Corp.*, 78 F.3d 424, 428 (9th Cir.) (arbitrator's challenged business relationship

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3 *Accord Olson v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 51 F.3d 157 (8th Cir. 1995) (vacating award because arbitrator failed to comply with governing NASD disclosure rule).

4 Similarly, in *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. —, 115 S. Ct. 1212 (1995), this Court recognized that the NASD Rules provided for an arbitral award of punitive damages, thereby justifying the award in that case. The extended discussion in *Mastrobuono* would have been mere dicta if the arbitral panel could simply have awarded punitive damages irrespective of the NASD Rules. What the Petition fails to recognize is that the rules under which an arbitration is conducted *matter*, and court holdings relying on one set of rules (*Schmitz*) cannot simply be transposed to an environment where those rules do not govern (this case).

was known to all parties when they agreed to arbitrate), *cert. dismissed*, 65 U.S.L.W. 3181 (Sept. 17, 1996).

Thus, the court of appeals in this case correctly determined that *Schmitz* did not supply a governing rule in this case. Its distinction of *Schmitz* did not create a split among the circuits.

Judicial prudence also counsels against granting certiorari in this case. Initially, it is evident that no important dispute of federal law exists here. Apart from the Ninth Circuit in *Schmitz* and the court of appeals in this case, only one appellate court has ever touched on the question Petitioner now seeks to place before this Court. That case, *People's Security Life Ins. Co. v. Monumental Life Ins. Co.*, 991 F.2d 141 (4th Cir. 1993), actually weighs substantially against Petitioner's argument. *People's Security* is distinguishable from *Schmitz* on precisely the same basis as this case: the arbitration in *People's Security* was not conducted pursuant to the NASD Rules or any other provisions requiring investigation of the prior business relationships of the arbitrator's former employer. For present purposes, however, the point is simply that this case presents no widespread schism among the courts of appeals on a pressing controversy that warrants this Court's involvement.

It is also obvious that the Petitioner, or any other party in his position, could easily have protected himself simply by contracting for the investigation he now wishes to write into the FAA. Mr. Feinberg's duties as an arbitrator were found within the four corners of the parties' agreement to submit the case to binding arbitration.[5] Those express duties did not include an obligation to investigate the business dealings of the arbitrator's former employer. Mr. Al-Harbi, however, certainly could have included such a requirement in the agreement had he wished. Indeed, had he done so, the *Schmitz* case might well have been

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5 *See, e.g., First Options of Chicago, Inc. v. Kaplan*, 514 U.S. —, 115 S. Ct. 1920, 1924 (1995) ("arbitration is simply a matter of contract between the parties"); *Mastrobuono*, 115 S. Ct. at 1215–19; *Merit Ins. Co. v. Leatherby Ins. Co.*, 714 F.2d 673, 679 (7th Cir.) (emphasizing contractual sources of arbitrators' powers and duties) (Posner, J.), *cert. denied*, 464 U.S. 1009 (1983).

on point, for the arbitrator would then have had an express duty to investigate similar to the express duty that case held dispositive. Here, however, Petitioner is simply asking this Court to protect him from a problem he or others in his position could readily have prevented in the first instance. His failure to do so suggests that the issue presented in the Petition amounts to nothing more than an expression of dissatisfaction with the arbitrator's decision.[6]

Because this case involves no disagreement among the circuits on any substantial question of federal law, this Court should deny the Petition for Writ of Certiorari.

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6 Judge Posner's skeptical view of the losing party's true motivation for complaining about the arbitrator's impartiality in *Merit* seems equally true here:

> [T]his is a $10 million case. If Leatherby had been worried about putting its fate into the hands of someone who might be linked in the distant past to the adversary's principal, it would have done more than it did to find out about Clifford. That it did so little suggests that its fear of a prejudiced panel is a tactical response to having lost the arbitration.

Merit, 714 F.2d at 683.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

RICHARD N. PAPPER
THEODORE BAJO
CITIBANK, N.A.
425 Park Avenue
New York, New York 10043
(212) 559-1970

W. NEIL EGGLESTON
Counsel of Record
STUART H. HARRIS
JAMES G. KRESS
TIMOTHY K. ARMSTRONG
HOWREY & SIMON
1299 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
(202) 783-0800

Counsel for Respondents

Supreme Court, U.S.
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No. 96-375

In The

Supreme Court of the United States

October Term, 1995

ABDULLAH E. AL-HARBI,

Petitioner,

vs.

CITIBANK, N.A. and CITIBANK, a.s.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia

REPLY BRIEF FOR PETITIONER

HERMAN M. BRAUDE
Counsel of Record
SAMUEL M. MORRISON, JR.
BRAUDE & MARGULIES, P.C.
Attorneys for Petitioner
888 17th Street, N.W., Suite 500
Washington, D.C. 20006
(202) 293-2993

9538
Lutz Appellate Services, Inc.
(800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21

9PP

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FURTHER REASONS FOR GRANTING THE WRIT

I.

THE SPLIT OF AUTHORITY AMONG THE FEDERAL CIRCUITS IS NOT "MANUFACTURED." IT IS AN IMPORTANT SPLIT AFFECTING A DUTY OF ARBITRATORS THAT IS RECOGNIZED BY THE AMERICAN BAR ASSOCIATION AND THE AMERICAN ARBITRATION ASSOCIATION.

The Respondents argue that the split of authority among the federal circuits as to whether an arbitrator has a duty to make a reasonable pre-arbitration conflict investigation is "manufactured" by the Petitioner, citing the fact that an NASD rule in the Ninth Circuit case, *Schmitz v. Zilveti,* 20 F.3d 1043 (9th Cir. 1994), contained a mandatory requirement for the arbitrator to make a pre-arbitration investigation. This does not change the fact that the split of authority exists. The issue of law here is whether "actual bias" is required, or whether an arbitrator must undertake a reasonable pre-arbitration investigation to discover and disclose facts which could constitute "evident partiality" under the Federal Arbitration Act. The opinion in *Schmitz* went far beyond the NASD rule, stating as a *general proposition* that, "an arbitrator may have a duty to investigate independent of its . . . duty to disclose," and further observed that "[a] violation of this independent duty to investigate may result in a failure to disclose that creates a reasonable impression of partiality." 20 F.3d at 1048.

To illustrate the split of authority, the full quotation from *Schmitz* is illustrative:

> Some courts have considered an arbitrator's lack of knowledge as a factor in determining

> whether evident partiality was present. See, e.g., — *Overseas Private Inv. Corp. v. Anaconda Co.*, 418 F. Supp. 107, 109-12 (D.D.C. 1976). The district court in this case made this factor decisive. The district court's conclusion appears to be premised on the idea that no person could reasonably conclude that an arbitrator could act partially based on facts of which he was unaware. *Anaconda*, 418 F. Supp. at 112.
>
> * * *
>
> Appellants have a better argument. Though lack of knowledge may prohibit actual bias, it does not always prohibit a reasonable impression of partiality. As Appellants argue, an arbitrator may have a duty to investigate independent of its *Commonwealth Coatings* duty to disclose. A violation of this independent duty to investigate may result in a failure to disclose that creates a reasonable impression of partiality under *Commonwealth Coatings*.

20 F.3d 1048. An "independent duty to investigate" does not arise out of a statutory rule — it arises out of an arbitrator's inherent duty to investigate and disclose facts that may create an "impression of partiality." As further stated by the Ninth Circuit, it is the parties themselves, rather than the arbitrators, who have the right to determine if there is "evident partiality":

> *Commonwealth Coatings* establishes that the parties rather than the arbitrators or the

> courts should be the judges of the partiality of arbitrators.

20 F.3d 1048.

The "independent duty to investigate" is recognized by the American Bar Association and the American Arbitration Association. The most comprehensive ethical guide for arbitrators is "The Code of Ethics for Arbitrators in Commercial Disputes", jointly adopted in 1977 by the American Arbitration Association and the American Bar Association. Canon II of the Code of Ethics for Arbitrators requires commercial arbitrators to make a reasonable investigation to inform themselves of potential conflicts:

> CANON II
>
> AN ARBITRATOR SHOULD DISCLOSE ANY INTEREST OR RELATIONSHIP LIKELY TO AFFECT IMPARTIALITY OR WHICH MIGHT CREATE AN APPEARANCE OF PARTIALITY OR BIAS.
>
> * * *
>
> Disclosure.
>
> A. Persons who are requested to serve as arbitrators should, before accepting, disclose
>
> * * *
>
> (2) any existing or *past* financial,

> business, professional — relationships — *which might reasonably create an appearance of partiality or bias.* — They should also disclose any such relationships involving — partners or business associates.
>
> B. Persons who are requested to accept appointment as arbitrators *should make a reasonable effort to inform themselves of any interests or relationships described in the preceding paragraph A.* [Emphasis added].

As stated in the Preamble of the Code "[T]he persons who have the power to decide should observe fundamental standards of ethical conduct." Thus, the American Bar Association and the American Arbitration Association agree with the position taken by the Ninth Circuit in *Schmitz* — that arbitrators have an independent duty to conduct a reasonable pre-arbitration conflict investigation and reveal the results to the participants.

The trial court below, and the Respondents here, relied heavily on *Anaconda,* an outdated case, where the District Court of the District of Columbia had held that actual bias would be required. The rationale of the decision in *Anaconda* was specifically rejected in *Schmitz,* which specifically declined to follow *Anaconda.* It should be noted that *Anaconda* was decided in 1976, before the American Bar Association and the American Arbitration Association adopted the Code of Ethics for Commercial Arbitrators, which requires arbitrators to investigate and disclose interests or relationships which might reasonably create an appearance of partiality or bias.

The line of cases represented by *Peoples Security Life Insurance Company v. Monumental Life Insurance Company,* 991 F.2d 141 (4th Cir. 1993) and *Anaconda* is clearly contrary to *Schmitz* and the Code of Ethics for Arbitrators adopted by the American Bar Association and the American Arbitration Association. By requiring proof of an arbitrator's present knowledge of facts constituting actual bias before an arbitration award will be vacated on the ground of "evident partiality", this standard results in no "independent duty to investigate", since the arbitrator may rely on his present knowledge.

There can be no clearer split of authority on the arbitrator's duty, or lack thereof, to make a pre-arbitration investigation for possible conflicts of interest. Due to the ever-growing importance of arbitration in the business community and the need for clarity of duty on the part of arbitrators, this split of authority should be resolved.

II.

THE RESPONDENT'S PROPOSED RESTATEMENT OF THE QUESTION PRESENTED FOR REVIEW SHOULD BE DISREGARDED AND CERTIORARI GRANTED ON THE PETITIONER'S QUESTION PRESENTED FOR REVIEW.

The Respondent's proposed restatement of the question is unnecessarily convoluted and argumentative, while the Petitioner's statement of the question presented for review is an accurate statement of the split of authority that is sought to be resolved.

For example, the Respondent's proposed restatement of the question infers (1) that the Petitioner had a duty to demand that the arbitrator conduct a pre-arbitration conflict investigation;

and (2) contrary to *Schmitz*, that it was the arbitrator, and not the Petitioner who had the right to make the decision on "evident partiality". Both inferences are merely argumentative conclusions that are hotly disputed, but are assumed to be true in the restated question. It is undisputed that the arbitrator's former law firm represented Citibank. Respondent's Brief at page 3. Any reasonable person could conclude that "evident partiality" could result. Thus, the underlying premise of the Respondent's restated question rests on shifting sands. An answer to the Respondent's "question" would create even more confusion on the real issue, and would not resolve the split of authority among the federal circuits.

CONCLUSION

To resolve the evident split of authority on this important issue, Certiorari should be granted on the Petitioner's statement of the question presented for review.

Respectfully submitted,

HERMAN M. BRAUDE
Counsel of Record
SAMUEL M. MORRISON, JR.
BRAUDE & MARGULIES, P.C.
Attorneys for Petitioner
888 17th Street, N.W. Suite 500
Washington, D.C. 20006
(202) 293-2993